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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

TRAVIS WARD,)
) No. 41331
Petitioner-Appellant,)
) Ada Co. Case No.
vs.) CV-2012-21341
)
STATE OF IDAHO,)
)
Respondent.)
_____)

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA

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District Judge

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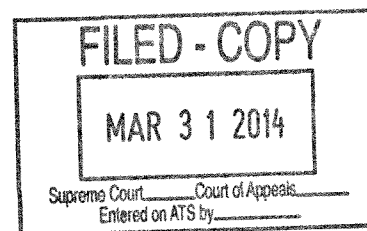


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STATEMENT OF THE CASE

Nature of the Case

Travis L. Ward appeals from the district court's order summarily dismissing his petition for post-conviction relief.

Statement of Facts and Course of Proceedings

Ward pled guilty to failure to register as a sex offender. (See R., p.108; #38733 PSI.¹) The district court did not order a new psychosexual or psychological evaluation prior to sentencing. (#38722 Tr.,² p.16, L.8 – p.17, L.7.) However, several previously-conducted evaluations were attached to Ward's presentence investigation report. (See PSI.) The district court imposed a unified sentence of 10 years, with two years fixed. (Id.) On appeal, Ward alleged his sentence was excessive, but the Idaho Court of Appeals affirmed the district court. State v. Ward, 2012 Unpublished Opinion No. 319, Docket No. 38733 (Idaho App. January 13, 2012).

Ward filed a *pro se* petition for post-conviction relief. (R., pp.1-11.) Ward asserted three claims: (1) ineffective assistance of trial and appellate counsel; (2) Fifth Amendment violation based upon "having been made to act as a witness against himself" and "not having counsel present during all phases of evaluations, interrogations;" and (3) "Violation of petitioner[']s Fourteenth Amendment rights to Due Process and Equal Protection clauses." (R., p.6.)

¹ The district court took judicial notice of the presentence report and attachments from Ward's underlying failure to register case. (R., p.108.)

² The Idaho Supreme Court took judicial notice of the reporter's transcripts of the entry of plea and sentencing hearings from Ward's underlying failure to register case. (8/26/13 Order.)

Ward's ineffective assistance of counsel claim contained three sub-claims: (a) trial counsel failed to "keep [him] appraised [sic] of all aspects of the case or to make [himself] readily available during critical evaluations"; (b) appellate counsel failed to adequately communicate with him; and (c) trial counsel failed to inform him of his Fifth Amendment rights with regard to psychological or psychosexual evaluations. (R., p.7.) In an accompanying affidavit, Ward also asserted that his counsel was ineffective for failing to request that the district court order a new psychological evaluation in connection with his new failure to register conviction. (R, p.10.)

The district court appointed counsel to represent Ward. (R., pp.33-34.) Appointed counsel filed a memorandum in support of Ward's petition. (R., pp.43-48.) The memorandum clarified Ward's petition, stating, "[Ward] has alleged that his trial/appellate counsel were ineffective and thereby deprived Petitioner of his Fifth, Sixth, and Fourteenth Amendment rights." (R., p.44.)

The state filed an answer and motion for summary dismissal, in which it asserted Ward failed to allege facts that demonstrated either deficiency or prejudice with regard to the ineffective assistance of counsel claims expressly raised in Ward's petition. (R., pp.49-53, 65-97.) The state also liberally construed Ward's petition and supplemental filings as asserting that Ward's trial counsel was additionally ineffective for failing to challenge the validity of a 1989 psychological evaluation which was attached to the PSI. (R., p.73.) The state moved for the summary dismissal of this claim as well. (Id.)

The district court granted the state's motion for summary dismissal. (R., pp.107-124.) The court addressed both the ineffective assistance of counsel claims expressly raised in Ward's petition, as well as the claim that Ward's trial counsel was ineffective for failing to object to the district court's consideration of the 1989 psychological evaluation. (Id.) With respect to each claim, the district court concluded that Ward failed to raise a *prima facie* case with regard to the applicable Strickland standard.³ (Id.) Ward timely appealed. (R., pp.125-128.)

³ Pursuant to Strickland v. Washington, 466 U.S. 668, 687-88 (1984), a post-conviction petitioner alleging ineffective assistance of counsel must demonstrate both deficient performance and resulting prejudice.

ISSUES

Ward states the issues on appeal as:

1. Should the district court's order of summary dismissal be reversed because the court dismissed on grounds other than those argued by the state in its motion?
2. Should the district court's order of summary dismissal also be reversed because the order did not address Mr. Ward's stand alone Fifth Amendment and Fourteenth Amendment claims?
3. Should the district court's order of summary dismissal as to the ineffective assistance of counsel claim also be reversed because Mr. Ward did raise a genuine issue of material fact both as to the deficient performance of trial counsel and as to prejudice?

(Appellant's brief, pp.5-6)

The state rephrases the issues on appeal as:

1. Has Ward failed to show the district court summarily dismissed his post-conviction petition on grounds entirely independent of those set forth by the state in its motion for summary dismissal?
2. Has Ward failed to show that the district court was required to specifically address Ward's stand-alone Fifth and Fourteenth Amendment claims where it granted the state's motion to dismiss in its entirety?
3. Has Ward failed to show the district court erred in summarily dismissing his ineffective assistance of counsel claim?

ARGUMENT

I.

Ward Has Failed To Show The District Court Summarily Dismissed His Post-Conviction Petition On Grounds Entirely Independent Of Those Set Forth By The State In Its Motion For Summary Dismissal

A. Introduction

Ward contends that the district court summarily dismissed his ineffective assistance of counsel claims on grounds other than those set forth by the state in its motion for dismissal, thereby depriving him of required notice. (Appellant's brief, pp.6-8.) However, a review of the record reveals that the district court dismissed Ward's ineffective assistance of counsel claims on substantially similar grounds as set forth by the state – that Ward failed to allege facts satisfying the applicable Strickland standard. Further, even if the court dismissed the petition on entirely independent grounds, any such error is harmless.

B. Standard Of Review

“On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of material fact exists based on the pleadings, depositions and admissions together with any affidavits on file.” Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007).

C. The District Court Dismissed Ward's Ineffective Assistance Of Counsel Claims On Substantially Similar Grounds As Set Forth By The State

The district court may, on a party's motion or its own initiative, summarily dismiss a petition for post-conviction relief. I.C. § 19-4906; Ridgley v. State, 148

Idaho 671, 675, 227 P.3d 925, 929 (Ct. App. 2010). The procedure for summary dismissal is equivalent to that for a summary judgment motion under I.R.C.P. 56. Ridgley, 148 Idaho at 675, 227 P.3d at 929 (citation omitted). Thus, dismissal is appropriate on determination that no “genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file.” Id.

Where the district court summarily dismisses a post-conviction petition on its own motion, without motion from the state, a petitioner is entitled to notice of the basis for the dismissal, and 20 days to respond. I.C. § 19-4906(b). If the state moves to dismiss, the motion serves as notice for which petitioner may respond under I.C. § 19-4906(c). Buss v. State, 147 Idaho 514, 517, 211 P.3d 123, 126 (Ct. App. 2009). The petitioner is entitled to a twenty-day period of time to respond to the state’s motion. State v. Christensen, 102 Idaho 487, 489, 632 P.2d 676, 678 (1981); Isaak v. State, 132 Idaho 369, 370, 972 P.2d 1097, 1098 (Ct. App. 1999). If the district court dismisses on grounds other than those articulated in the state’s motion, the petitioner must be given additional notice and an opportunity to respond pursuant to I.C. § 19-4906(b). Id.

In Kelly v. State, 149 Idaho 517, 236 P.3d 1277 (2010), the Idaho Supreme Court clarified the distinction in post-conviction appeals between a claim of insufficient notice of the grounds for summary dismissal, and a claim that there was *no* notice of the grounds for summary dismissal. An appellant may not challenge the sufficiency of the notice contained in the state’s motion for summary disposition and accompanying memoranda for the first time on appeal. Id. at 521-522, 236 P.3d at 1281-1282 (citing DeRushe v. State, 146 Idaho 599,

602, 200 P.3d 1148, 1151 (2009)). An appellant may, however, assert for the first time on appeal that he did not receive *any* notice of dismissal, i.e., that the district court dismissed the petitioner's claims on grounds *entirely independent* from the ground he was provided notice of in the state's motion and supporting briefs. Id.

In Kelly, the Idaho Supreme Court held that the appellant failed to show the district court dismissed the post-conviction claims on *entirely independent* grounds where the state provided the applicable Strickland ineffective assistance of counsel standard, cited Idaho law regarding ineffective assistance of counsel claims; and where the district court held that “Kelly has not provided specific facts to show that [Kelly's attorney's] behavior fell below an objective standard of reasonable representation, and that such a claim was 'unsupported by the record.’” Id. at 522-524, 236 P.3d at 1282-1284. The Court also held that “[w]hen a trial court summarily dismisses an application for post-conviction relief based *in part* on the arguments presented by the State, this is sufficient to meet the notice requirements.” Id. at 523, 236 P.3d at 1283 (emphasis in original, citations omitted)).

In the present case, because Ward failed to preserve any claim that the state's motion to dismiss provided insufficient notice of summary dismissal, he must meet the more stringent standard of showing that the district court dismissed the claims in question on *entirely independent* grounds than set forth by the state. Ward cannot make such a showing.

In his post-conviction petition and supporting affidavit, Ward asserted his trial counsel was ineffective for failing to keep him apprised of all aspects of the

case, failing to inform him of his Fifth Amendment rights regarding pre-sentence evaluations, and for failing to request a new psychological evaluation. (R., pp.1-11.)

In its response and motion to dismiss, prior to discussing Ward's claims individually, the state cited the applicable Strickland standard and cited Idaho law relating to ineffective assistance of counsel claims. (R., pp.69-71.) The state summarized that Ward "has raised no genuine issues of material fact, which, if resolved in the applicant's favor would entitle the applicant to the requested relief" under the applicable Strickland standard as to any of his claims. (R., p.74.) In addition to addressing the claims expressly raised in Ward's petition and affidavit, the state liberally construed Ward's *pro se* petition as also asserting that Ward's trial counsel was ineffective for failing to challenge the validity of a 1989 psychological evaluation that was attached to Ward's PSI.⁴ (R., p.73.)

Specifically, the state argued: (1) the grounds for relief expressly asserted in Ward's petition were too bare and conclusory to substantiate a response; (2) Ward could not show his counsel was ineffective for failing to advise him of his

⁴ Despite this liberal interpretation of Ward's petition, the state submits that Ward's petition and supporting affidavit do not allege that trial counsel was ineffective for failing to object to the district court's consideration of a 1989 psychological evaluation. Ward's appointed counsel never amended the petition to include this claim. "It is clearly established under Idaho law that a cause of action not raised in the party's pleadings may not be considered on summary judgment nor may it be considered for the first time on appeal." Kelly, 149 Idaho at 523-524, 236 P.3d at 1283-1284. The state thus asserts, in the alternative, that Ward was not entitled to notice on any claim that he did not raise in his petition, and that the district court's summary dismissal of the claim in question may be affirmed on the ground that the district court erred by considering the claim in the first place.

Fifth Amendment rights with regard to any post-plea evaluation where he did not participate in any such evaluation, and where the guilty plea advisory form indicated Ward understood his rights; (3) in light of trial counsel's demonstrated strategy at the sentencing hearing, Ward failed to allege facts establishing that counsel was objectively deficient in failing to request a new psychological evaluation, or that any prejudice resulted; (4) because Estrada v. State, 143 Idaho 558, 149 P.3d 833 (2006),⁵ is not retroactive, Ward's trial counsel could not have successfully challenged the court's consideration of the 1989 evaluation; and (5) any attempt to challenge the effectiveness of counsel who represented Ward in the 1989 rape proceedings was untimely. (R., pp.65-74.)

The district court dismissed Ward's post-conviction petition on grounds substantially similar to those set forth by the state. The court generally concluded that Ward failed to allege facts that would entitle him to relief under the Strickland standard as to any of his claims. (R., pp.107-121.) Specifically, the court concluded: (1) Ward failed to provide any evidentiary support for his claims that his attorney failed to keep him apprised of the case, or that counsel's decision not to request a new evaluation constituted deficient performance; (2) Ward failed to allege facts demonstrating that his counsel's failure to challenge the 1989 psychological evaluation constituted deficient performance because counsel did not have a Sixth Amendment obligation to investigate whether the prior evaluation was conducted in an unconstitutional manner, and because

⁵ In Estrada, the Idaho Supreme Court held that a defendant has the right to obtain accurate advice from counsel about his right to remain silent and decline participation in a psychosexual evaluation.

Estrada is not retroactive; and that in any event, Ward also failed to establish prejudice because the district court did not rely on the 1989 evaluation at sentencing. (Id.)

The district court thus dismissed Ward's petition on substantially similar, if not precisely identical, grounds as set forth by the state. Because Ward has failed to show that the district court dismissed his ineffective assistance of trial counsel claims on grounds entirely independent of those set forth by the state, he has failed to show that he was deprived of required notice.

D. Even If The District Court Dismissed The Petition On Entirely Independent Grounds, Any Such Error Is Harmless

If a petitioner is "not left with an 'invisible target' and is able to respond in a meaningful way to the district court's notice of intent to dismiss," then any lack of adequate notice is harmless. Baker v. State, 142 Idaho 411, 422-423, 128 P.3d 948, 958-959 (Ct. App. 2005); see also Franck-Teel v. State, 143 Idaho 664, 671, 152 P.3d 25, 32 (Ct. App. 2006) ("Nevertheless, if Franck-Teel's response to the state's motion for summary dismissal reveals that she understood the basis for dismissal..., then we will conclude that the inadequacy of notice was harmless error.").

In this case, to the extent the district court's expressed rationale for dismissal was so distinct from the grounds set forth by the state as to render the court's order a *sua sponte* dismissal, any such error is harmless. Ward had full opportunity to present evidence and argument as to how he could satisfy the deficiency and prejudice prongs of Strickland. Further, Ward has not attempted

to describe what type of argument or evidence he would have presented if only he had more precise notice of the grounds for the district court's dismissal of these claims.

Because Ward was not left with an “invisible target,” and had the opportunity to respond in a meaningful way to the state's argument that he had failed to establish a *prima facie* case regarding the Strickland standard as to any of his claims, any error regarding required notice of the summary dismissal of those claims is harmless.

II.

Ward Has Failed To Show That The District Court Was Required To Specifically Address Ward's Stand-Alone Fifth And Fourteenth Amendment Claims Where It Granted The State's Motion To Dismiss In Its Entirety

A. Introduction

Ward contends that the district court erred by failing to consider his stand-alone Fifth and Fourteenth Amendment claims. (Appellant's brief, pp.8-9.) Ward's argument fails because the record reveals that the state moved for the dismissal of these claims, and the district court granted the state's motion in its entirety.

The district court's dismissal order may also be affirmed on any several alternate. First, Ward abandoned these stand-alone claims in his memorandum in support of his petition. Further, Ward failed to make use of avenues by which he could have challenged the district court's dismissal order below. Finally, even if the district court erred in failing to expressly address these claims, no remand is necessary because the record reveals an obvious answer to the relevant

question, in that Ward failed to support the stand-alone claims with any evidence or argument.

B. The District Court Was Not Required To Expressly Address Ward's Stand-Alone Fifth And Fourteenth Amendment Claims

In his *pro se* petition for post-conviction relief, Ward asserted two claims in addition to his ineffective assistance of counsel claims. Ward asserted: “(b) Violations of the Fifth Amendment of [sic] having been made to act as a witness against himself, by not having counsel present during all phases of evaluations, interrogations; [and] (c) Violations of petitioner[‘s] Fourteenth Amendment right to Due Process and Equal Protection Clauses.” (R., p.6.) Ward did not provide any explanation, argument, or evidence relating to these claims. (See R., pp.5-11.)

Ward’s subsequently appointed counsel filed a memorandum in support of the petition, which clarified that Ward was “alleg[ing] that his trial/appellate counsel were ineffective and thereby deprived Petitioner of his Fifth, Sixth, and Fourteenth Amendment rights.” (R., p.44.) Ward’s counsel did not attempt to argue the merits of either of the stand-alone Fifth and Fourteenth Amendment claims. (See *id.*)

In its motion for summary dismissal of Ward’s petition, the state argued that the asserted grounds for relief in Ward’s petition were “too bare and conclusory to substantiate a response.” (R., p.66.) The state went on to respond to the “clarified position” set for in Ward’s counsel’s memorandum. (R., pp.69-74.) The state requested the district court to “dismiss the petition.” (R., p.74 (emphasis omitted)). When the district court granted the state’s motion (R.,

pp.107-121), it thus dismissed Ward's petition, and all the claims contained within.

Ward has cited no authority standing for the proposition that a district court must expressly address each post-conviction claim when granting a party's motion for summary dismissal. Neither of the cases relied on by Ward - Dawson v. Cheyovich Family Trust, 149 Idaho 375, 380, 234 P.3d 699, 704 (2010), nor Miramar Hotel Corp. v. Frank B. Hall & Co. of California, 163 Cal.App.3d 1126 (1985), stand for this proposition. In Dawson, the Idaho Supreme Court held that the district court abused its discretion by failing to rule on the plaintiff's motion for relief from judgment. Dawson, 149 at 380, 234 P.3d at 704. In Miramar Hotel Corp., a California appellate court held that the trial court erred by failing to issue a statement of decision where a party had timely moved for one pursuant to state law. Miramar Hotel Corp., 163 Cal.App.3d 1126 Neither case is applicable to the present one. In the present case, The district court did not fail to rule on any motion, but instead considered and granted the state's motion for summary dismissal of Ward's petition. Ward did not move to amend or otherwise challenge the judgment. Therefore, Ward has failed to show the district court erred by declining to expressly address each of his claims.

In the alternative, the district court was not required to expressly address these claims because Ward abandoned them in the course of the post-conviction proceedings. In his memorandum of support, by explaining that he was "alleg[ing] that his trial/appellate counsel were ineffective and thereby deprived Petitioner of his Fifth, Sixth, and Fourteenth Amendment rights," Ward clarified

his petition and consolidated these claims. Ward did not attempt to allege or present evidence for any stand-alone Fifth or Fourteenth Amendment claim in any subsequent affidavit or other filing. Ward therefore abandoned those stand-alone claims, and the district court did not err by failing to expressly address them.

Further, Ward failed to make use of other avenues by which he could have challenged the district court's dismissal order below. See I.R.C.P. 11(a)(2)(B) (governing motions for reconsideration); I.R.C.P. 52(b) (governing motions to amend judgments or to make additional findings); I.R.C.P. 59(e) (governing motions for relief from judgment). The Idaho Court of Appeals has encouraged the utilization of these rules where petitioners assert procedural errors in post-conviction proceedings, to give the court an opportunity to take prompt corrective actions, or to provide a rationale for its decisions that may be evaluated on appeal. See Isaak v. State, 132 Idaho 369, 370 n. 2, 972 P.2d 1097, 1098 n. 2 (Ct. App. 1999).

Finally, the absence of express findings and conclusions may be disregarded by the appellate court where the record is clear and yields an obvious answer to the relevant question. Maxfield v. State, 108 Idaho 493, 497, 700 P.2d 115, 119 (Ct. App. 1985); (citing Pope v. Intermountain Gas Co., 103 Idaho 217, 225, 646 P.2d 988, 996 (1982)). In this case, Ward's stand-alone Fifth Amendment and Fourteenth amendment claims, as pled in his petition, were, as the state argued in its motion for summary dismissal, "too bare and concusory to substantiate a response." (See R., p.66.) In his petition and supporting affidavit,

Ward does not even specify what “evaluation” or “interrogation” at which he was allegedly deprived the presence of counsel. Further, the petition and supporting affidavit is completely devoid of any details or context regarding Ward’s Fourteenth Amendment claim. Because the bare and conclusory nature of these claims yield an obvious answer to the relevant question of whether summary dismissal was appropriate, this Court may decline to vacate the district court’s dismissal order, even if the district court erred by failing to expressly address these claims.

In the alternative, should this Court find that the district court committed reversible error by failing to specifically address each of Ward’s claims, it should vacate the dismissal order and remand the case with instructions for the court to rule on the state’s motion to dismiss with regard to the Fifth and Fourteenth Amendment claims. Through the state’s motion, Ward has already been placed on notice that the district court may dismiss those claims on the grounds that they are bare and conclusory, and thus do not allege facts which, if true, would entitle Ward to relief.

By clarifying the nature of his claim in his post-petition briefing, Ward abandoned his stand-alone Fifth and Fourteenth Amendment claims. This Court should therefore affirm the district court’s denial of Ward’s petition for post-conviction relief.

III.

Ward Has Failed To Show The District Court Erred In Summarily Dismissing His Ineffective Assistance Of Counsel Claim

A. Introduction

Ward contends the district court erred in summarily dismissing his claims that his trial counsel was ineffective for failing to challenge the district court's apparent utilization of Ward's 1989 psychological evaluation at sentencing. (Appellant's brief, pp.9-13.) However, a review of the record reveals that Ward failed to allege facts demonstrating either that his trial counsel was deficient, or that he was prejudiced by any deficiency under the applicable Strickland standard.

B. Standard Of Review

"On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of material fact exists based on the pleadings, depositions and admissions together with any affidavits on file." Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007).

C. Ward Failed To Allege Facts Demonstrating Ineffective Assistance Of Counsel

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief in response to a party's motion or on the court's own initiative. "To withstand summary dismissal, a post-conviction applicant must present evidence establishing a *prima facie* case as to each element of the

claims upon which the applicant bears the burden of proof.” State v. Lovelace, 140 Idaho 53, 72, 90 P.3d 278, 297 (2003) (citing Pratt v. State, 134 Idaho 581, 583, 6 P.3d 831, 833 (2000)). Thus, a claim for post-conviction relief is subject to summary dismissal “if the applicant’s evidence raises no genuine issue of material fact” as to each element of the petitioner’s claims. Workman v. State, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007) (citing I.C. § 19-4906(b), (c)); Lovelace, 140 Idaho at 72, 90 P.3d at 297.

While a court must accept a petitioner’s un rebutted allegations as true, the court is not required to accept either the applicant’s mere conclusory allegations, unsupported by admissible evidence, or the applicant’s conclusions of law. Workman, 144 Idaho at 522, 164 P.3d at 802 (citing Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001)). The trial court is not required to conduct an evidentiary hearing prior to dismissing the petition when the alleged facts, even if true, would not entitle the petitioner to relief. Id. (citing Stuart v. State, 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1989)). “Allegations contained in the application are insufficient for the granting of relief when (1) they are clearly disproved by the record of the original proceedings, or (2) do not justify relief as a matter of law.” Id.

A post-conviction petitioner alleging ineffective assistance of counsel must demonstrate both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); State v. Charboneau, 116 Idaho 129, 137, 774 P.2d 299, 307 (1989). An attorney’s performance is not constitutionally deficient unless it falls below an objective standard of reasonableness, and there

is a strong presumption that counsel's conduct is within the wide range of reasonable professional assistance. Gibson v. State, 110 Idaho 631, 634, 718 P.2d 283, 286 (1986); Davis v. State, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct. App. 1989). To establish prejudice, a defendant must show a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. Aragon v. State, 114 Idaho 758, 761, 760 P.2d 1174, 1177 (1988); Cowger v. State, 132 Idaho 681, 685, 978 P.2d 241, 244 (Ct. App. 1999). Bare assertions and speculation, unsupported by specific facts, do not make out a *prima facie* case for ineffective assistance of counsel. Roman v. State, 125 Idaho 644, 649, 873 P.2d 898, 903 (Ct. App. 1994).

In this case, Ward asserted that his trial counsel was ineffective for failing to challenge the 1989 psychological evaluation that was attached to his new presentence investigation. Even assuming Ward properly pled this claim,⁶ he failed to make out a *prima facie* case for ineffective assistance of counsel. Ward has failed to allege facts, which if true, establish either deficient performance or prejudice under Strickland.

With regard to deficient performance, it would have been contrary to the strategy of Ward's counsel at sentencing to attempt to shield the district court from a decades-old psychological evaluation. At the sentencing hearing, Ward's counsel referenced Ward's troubled past, but argued that he had made great improvements in recent years, and had successfully complied with probation for

⁶ As discussed above, it does not appear that Ward actually raised this claim in his post-conviction petition. However, the state and the district court both addressed it.

a period of time. (#38733 Tr., p.31, L.1 – p.35, L.18.) Thus, Ward's counsel's demonstrated strategy was to readily acknowledge the life difficulties that were described in Ward's earlier evaluations, but to emphasize Ward's improvement in the subsequent two decades. Ward did not attempt to show that this strategy constituted objectively deficient performance.

Additionally, Ward cannot show that the Sixth Amendment required his counsel to investigate the circumstances of the 1989 evaluation to determine whether any of Ward's rights were violated. As the district court recognized (R., pp.114-116), trial counsel does not generally have a professional obligation "to investigate his client's prior convictions to identify some constitutional infirmity in those cases, even where that case was used to enhance his present sentence." See Lackawanna County District Attorney, et al. v. Coss, 532 U.S. 294, 403-404 (2001). The same reasoning applies to the present case. An attorney is not required to investigate his client's prior evaluations to identify some constitutional infirmity, especially where, as here, Ward did not allege that the 1989 evaluation, or any district court utilization of it, actually violated any specific right.

Finally, any attempt by Ward's counsel to object to the presence of the 1989 evaluation in the presentence report would have been unsuccessful. The Idaho Supreme Court has noted, in dicta, that Estrada "did not announce a new rule of law entitled to retroactive effect." Vavold v. State, 148 Idaho 44, 46, 218 P.3d 388, 390 (2009). Ward has failed to cite any authority supporting the proposition that a district court may not consider pre-Estrada evaluations in sentencing determinations.


Ward also failed to allege facts demonstrating prejudice. As the district court concluded (R., pp.119-120), there is no evidence in the record that the court considered Ward's 1989 evaluation in making its sentencing determination. While the district court referenced Ward's "psychological evaluations," and the fact that they were "concerning" (#38722 Tr., p.41, Ls.2-11), Ward's PSI contained at least seven different evaluations dating back to 1986, as well as the PSI from Ward's 1989 rape conviction, and a report from the jurisdictional review committee. (See generally #38733 PSI.) Ward cannot show that he was prejudiced by any particular evaluation ordered in conjunction with any previous criminal case. Nor has Ward pointed to anything particularly prejudicial from his 1989 evaluation that was not merely cumulative to the information contained in other evaluations.

Ward failed to allege facts, which if true, demonstrate either that his trial counsel's performance was deficient, or that any such deficiency resulted in prejudice. He has therefore failed to show that the district court erred in summarily dismissing his post-conviction petition.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order summarily dismissing Ward's petition for post-conviction relief.

DATED this 31st day of March, 2014



MARK W. OLSON
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 31th day of March, 2014, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

DEBORAH WHIPPLE
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MARK W. OLSON
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MWO/pm